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Supreme Court of the United States

(OCTOBER TERM, 1944)

No. 287

V. MOORE,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF.

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July, 1945.

UTTERBACK TYPESETTING CO., 13 S. Walker, Oklahoma City 4, Okla.

INDEX

PAGE

Petition for Writ of Certiorari 1-8

I. Summary Statement of the Matter Involved..... 1-5

II. Decisions Below 6

III. Jurisdiction 6

IV. Questions Presented 6-7

V. Reasons Relied Upon for the Allowance of the Writ 7-8

Supporting Brief 9-17

Opinions 9

Jurisdiction 9

Statement of the Case 9-10

Specifications of Error 10

Summary of the Argument 11

Point I 11

Point II 12

Argument 12

Point I. The application for the order to show cause charged the petitioner with a felony in the nature of an indirect criminal contempt. He entered a plea of not guilty thereto, was fined $5,000.00 and committed to imprisonment until the payment thereof. Such judgment and sentence, based upon said application, is void under the Fifth Amendment to the Constitution of the United States and his plea of not guilty is not a waiver of his rights thereunder. Subdivision 2 of his grounds of appeal "that said judgment and sentence is contrary to law" was sufficient to present the validity of said judgment and sentence and, even though this

PAGE

question was not presented to and determined adversely to him by the Circuit Court of Appeals, yet nevertheless he may challenge said judgment and sentence here as being violative of his constitutional rights under the Fifth Amendment 12

Point II. The Circuit Court of Appeals erred in holding that the sentence imposed was not unreasonable and excessive under the Eighth Amendment to the Constitution of the United States.. 15

AUTHORITIES

Ex Parte McClusky, 40 Fed. 71 .....14, 15
Ex Parte Wilson, 114 U. S. 417, 29 L. Ed. 89..... 14

Falconi v. United States (6th Cir.), 280 Fed. 766.... 14

Gompers v. Buck's Stove & R. Co., 221 U. S. 418, 55 L. Ed. 797 .....13, 14
Gompers v. United States, 223 U. S. 604, 58 L. Ed. 1115 13

Hill v. United States, 300 U. S. 105, 81 L. Ed. 537.... 13
House, Petitioner v. Mayo, — U. S. —, 88 L. Ed. Advance Sheet No. 8, Page 528 15
Huffman v. United States (10th Cir.), 148 Fed. (2d) 943 16

Mackin v. United States, 117 U. S. 348, 29 L. Ed. 909.. 14
Michaelson v. United States, 262 U. S. 42, 69 L. Ed. 162 13

Nye v. United States, 313 U. S. 33-57, 85 L. Ed. 1172.. 13

Parkinson v. United States, 121 U. S. 281, 30 L. Ed. 959 14
Pendergast v. United States, 317 U. S. 412-422, 87 L. Ed. 368 13

Re Bradley, 318 U. S. 50-54, 87 L. Ed. 608..... 13

Smith v. United States (9th Cir.), 143 Fed. (2d) 228.. 16

United States v. Gill, 55 Fed. (2d) 399 .....14, 15
United States v. Goldman, 277 U. S. 229, 72 L. Ed. 862 13

PAGE

United States v. Sloan, 31 Fed. Supp. 327 14

Wilson v. United States (8th Cir.), 26 Fed. (2d) 215.. 13

17 C. J. S., Section 91 16

Constitution of the United States,
Eighth Amendment 7
Fifth Amendment 10, 11

Emergency Price Control Act 16

Judicial Code, Sec. 240(a), as amended by Act of Feb. 13, 1925, 43 Stat. 938, 28 USCA, Sec. 347(a).....6, 9

Rules of Criminal Procedure, Rule 9 5
Rules of Criminal Procedure, Rule 11 6

18 USCA 385, 389 13
18 USCA 641 (1944 Cumulative Pocket Part) 15

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

The above-named petitioner respectfully shows:

I

SUMMARY STATEMENT OF THE MATTER INVOLVED

On September 9, 1944, in an action pending in the United States District Court for the Western District of Oklahoma, entitled, Chester Bowles, Adiministrator Office of Price Administration, vs. V. Moore the petitioner here, Civil Action No. 1580, Judge Chandler entered a preliminary injunction, the applicable portion of which is:

"It is, therefore, by the Court, considered, ordered, adjudged and decreed that the defendant herein, its agents, servants, employees, representatives and attorneys and all person acting in concert or participation with any of them be, and they are hereby, temporarily enjoined from directly or indirectly:

"1. Offering for sale as a dealer, used automobiles without having placed or attached upon each of said cars, a label or tag, in the form and containing the information required by Section 10 and Appendix E of Maximum Price Regulation No. 540, and in violation thereof.

"2. Offering for sale and delivery used automobiles at prices in excess of the ceiling prices established by Appendix B and Appendix D of said Regulation and in violation of Section 2 of Maximum Price Regulation No. 540.

"3. Offering for sale and delivery used automobiles only on condition and under the requirement that the purchaser make payment in whole or in part by exchanging or transferring or delivery to the seller, another automobile and refusing to sell or offer to sell used automobiles for cash only, in violation of Section 9 of said Regulation.

"4. Offering, soliciting, attempting or agreeing to do any of the foregoing" (R. 2).

On September 29, 1944, said Administrator filed an application in said Court for an order to show cause why the defendant in said cause, the petitioner here, should not be adjudicated and punished for criminal contempt. This application is signed by the District Enforcement Attorney and his Assistant, along with Charles E. Dierker,

United States District Attorney. There is attached to the application the affidavit of Newell V. Morgan, an investigator for the Office of Price Administration. A copy of said preliminary injunction is set out in said application (R. 1-5).

On said day said Judge made and entered an order to show cause returnable October 6, 1944. Service of this order was duly made upon the petitioner, and on October 5, 1944, he filed his response, and on October 6, 1944, entered a plea of not guilty (R. 5-7).

On November 3, 1944, said Judge made an order finding the petitioner guilty as charged. This order, among other things, provides:

> "It is ordered by the Court that this cause be referred to the Probation Officer for investigation and report and continued for sentence pending the investigation" (R. 7).

On December 8, 1944, said Judge filed a memorandum opinion (R. 7-10). On the same date judgment and commitment was made and entered wherein the petitioner was fined the sum of $5,000.00. This judgment and commitment is:

> "On this 8th day December, 1944, this cause is called for sentence of the defendant on finding of guilt of contempt by the Court heretofore.
>
> "On this 8th day of December, 1944, came the United States Attorney, and the defendant, V. Moore, appearing in proper person, and by J. B. Dudley, Esq., his attorney, and

"The defendant having been adjudged guilty of contempt charged in the order to show cause in the above-entitled cause, to-wit, violation injunction order in Case No. 1580-Civil, styled Chester Bowles, Administrator, Office of Price Administration vs. V. Moore, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By the Court

"Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the county jail type to be designated by the Attorney General or his authorized representative, pay a fine in the sum of Five Thousand ($5,000.00) Dollars and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

"It is Further Ordered that if he furnishes satisfactory receipts showing re-payment of the money illegally exacted from the young men of the Merchant Marine, the fine will be reduced in that amount.

"It is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein" (R. 10-11).

On December 9, 1944, the petitioner filed notice of appeal and the grounds thereof to the United States Circuit Court of Appeals for the Tenth Circuit from said

judgment and sentence under the Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilt (R. 11-13).

On January 3, 1945, an order was made giving the petitioner up to and including March 6, 1945, within which to prepare, procure and file bill of exceptions on appeal and file assignment of errors with the Clerk under Rule 9 of said Rules of Criminal Procedure (R. 14).

This order was complied with and the appeal duly perfected under said Rules.

No motion to dismiss the appeal was filed in the Circuit Court of Appeals, but the appellee, the respondent here, through its counsel, took the position that that Court had no jurisdiction for the reason that said Rules of Criminal Procedure did not apply or govern appeals in a criminal contempt case. The Circuit Court considered the question and held that the appeal was timely and properly perfected under said Rule.

On July 2, 1945, said Circuit Court of Appeals, by a divided Court, affirmed the judgment of the lower Court (R. 103-109). Upon the written application of the appellant, the petitioner here, mandate was stayed (R. 109).

II

DECISIONS BELOW

The Trial Court filed an opinion on December 8, 1944 (R. 7-10) which has not been reported. The opinion of the Circuit Court of Appeals was filed on July 2, 1945 (R. 103-109). It has not been officially reported. No petition for rehearing was filed. On July 12, 1945, mandate was stayed for a period of twenty days from that date (R. 109).

III

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 USCA, Sec. 347 (a). Rule 11 of the Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilt.

IV

QUESTIONS PRESENTED

The following questions are presented:

(1) Did the Trial Court have the power and jurisdiction to make and enter said judgment and sentence; and if not, may the petitioner here challenge the same as being void under the Constitution and laws of the United States, he not having made such challenge in the Courts below?

(2) If said judgment and sentence is valid and the Trial Court had the right and jurisdiction to make and enter it, is said sentence excessive, unreasonable, and violative of the petitioner's rights under the Eighth Amendment to the Constitution of the United States?

V

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The reasons upon which petitioner relies for allowance of the writ are as follows:

(1) The application for the order to show cause charged the petitioner with a felony in the nature of an indirect criminal contempt. He entered a plea of not guilty thereto, was fined $5,000.00 and committed to imprisonment until the payment thereof. The only legal way by which he could be charged with such offense was by presentment or indictment of a Grand Jury under the Fifth Amendment to the Constitution of the United States, and the judgment and sentence is void as reflected by the record. His plea of not guilty was not a waiver of his constitutional rights. This particular question was not presented to the Trial Court or the Circuit Court of Appeals, but the record presents the question and it is a fundamental one which should be determined by this Court.

(2) Said sentence is excessive under the Eighth Amendment to the Constitution of the United States and the Circuit Court of Appeals erred in affirming said judg-

ment and sentence, and this Court should take jurisdiction and review the judgment of the Trial Court affirmed by the Circuit Court of Appeals. In an indirect criminal contempt the Trial Court may either impose a fine or imprisonment but cannot do both, and the only limitation as to the fine or imprisonment is said constitutional amendment, and this Court, in order to protect the constitutional rights of the petitioner, should take jurisdiction.

WHEREFORE, It is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Tenth Circuit should be granted.

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SUPPORTING BRIEF

OPINIONS

The opinion of the Trial Court was filed on December 8, 1944 (R. 710), which has not been reported. The opinion of the Circuit Court of Appeals was filed on July 2, 1945 (R. 103-109), which has not been officially reported. No petition for rehearing was filed. On July 12, 1945, mandate was stayed for twenty days from that date (R. 109).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 USCA Sec. 347 (a). Rule 11 of the Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilt.

STATEMENT OF THE CASE

On September 29, 1944, the Administrator of the Office of Price Administration, on behalf of the United States, filed an application in the Court below for an order on the petitioner to show cause why he should not be adjudicated and punished for criminal contempt, and thereupon an order to show cause was entered returnable October 6, 1944, which order was served upon the petitioner. In due course he filed a response and entered a plea of not guilty (R. 1-7). On November 3, 1944, an order was made finding him guilty as charged. On December 8, 1944, he was sentenced to pay a fine of $5,000.00.

The petitioner offered no evidence and under the evidence presented against him he wilfully violated the preliminary injunction of September 9, 1944, set out in said application.

The petitioner in his notice of appeal assigned three grounds, Subdivisions 2 and 3 of which are: "(2) Said judgment and sentence is contrary to law. (3) Said judgment and sentence is excessive, the amount of the fine being unreasonable, and violates his constitutional rights under the Eighth Amendment to the Constitution of the United States" (R. 12).

He timely perfected an appeal to the Circuit Court of Appeals under the Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilt. The judgment and sentence appealed from was affirmed on July 2, 1945.

SPECIFICATIONS OF ERROR

(1) The Circuit Court of Appeals erred in holding that the sentence imposed was not unreasonable and excessive under the Eighth Amendment to the Constitution of the United States.

(2) The application for the order to show cause charged the petitioner with a felony in the nature of an indirect criminal contempt. He entered a plea of not guilty thereto, was fined $5,000.00 and committed to imprisonment until the payment thereof. Such judgment and sentence, based upon said application, is void under the Fifth Amendment to the Constitution of the United States and his plea

of not guilty is not a waiver of his rights thereunder. Subdivision 2 of his grounds of appeal "that said judgment and sentence is contrary to law" was sufficient to present the validity of said judgment and sentence and, even though this question was not presented to and determined adversely to him by the Circuit Court of Appeals, yet nevertheless he may challenge said judgment and sentence here as being violative of his constitutional rights under the Fifth Amendment.

SUMMARY OF THE ARGUMENT

Point I

The application for the order to show cause charged the petitioner with a felony in the nature of an indirect criminal contempt. He entered a plea of not guilty thereto, was fined $5,000.00 and committed to imprisonment until the payment thereof. Such judgment and sentence, based upon said application, is void under the Fifth Amendment to the Constitution of the United States and his plea of not guilty is not a waiver of his rights thereunder. Subdivision 2 of his grounds of appeal "that said judgment and sentence is contrary to law" was sufficient to present the validity of said judgment and sentence and, even though this question was not presented to and determined adversely to him by the Circuit Court of Appeals, yet nevertheless he may challenge said judgment and sentence here as being violative of his constitutional rights under the Fifth Amendment.

Point II

The Circuit Court of Appeals erred in holding that the sentence imposed was not unreasonable and excessive under the Eighth Amendment to the Constitution of the United States.

ARGUMENT

Point I

The application for the order to show cause charged the petitioner with a felony in the nature of an indirect criminal contempt. He entered a plea of not guilty thereto, was fined $5,000.00 and committed to imprisonment until the payment thereof. Such judgment and sentence, based upon said application, is void under the Fifth Amendment to the Constitution of the United States and his plea of not guilty is not a waiver of his rights thereunder. Subdivision 2 of his grounds of appeal "that said judgment and sentence is contrary to law" was sufficient to present the validity of said judgment and sentence and, even though this question was not presented to and determined adversely to him by the Circuit Court of Appeals, yet nevertheless he may challenge said judgment and sentence here as being violative of his constitutional rights under the Fifth Amendment.

Under the allegations of the application for the order to show cause the petitioner is charged with a felony in the nature of an indirect criminal contempt for wilfully violating the provisions of said preliminary injunction, and the general limitation statute within which a prosecution might be commenced against him applies.

—*Pendergast* v. *United States*, 317 U. S. 412-422, 87 L. Ed. 368;

Nye v. *United States*, 313 U. S. 33-57, 85 L. Ed. 1172;

United States v. *Goldman*, 277 U. S. 229, 72 L. Ed. 862;

Gompers v. *Buck's Stove & R. Co.*, 221 U. S. 418, 55 L. Ed. 797;

Gompers v. *United States*, 223 U. S. 604, 58 L. Ed. 1115.

Federal District Courts have the inherent and statutory power to punish for criminal contempt. The contempt charged against the petitioner does not come within the purview of Section 385, 28 USCA, but doubtless comes under Section 389 of this Title. Where a court exercises its inherent power under these sections or either of them, or otherwise, in the absence of an express statute it is limited as to the punishment which it may inflict in that a sentence of both fine and imprisonment cannot be imposed, and the amount of each is limited by the Eighth Amendment to the Constitution of the United States.

—*Wilson* v. *United States* (8th Cir.), 26 Fed. (2d) 215;

Re Bradley, 318 U. S. 50-54, 87 L. Ed. 608;

Michaelson v. *United States*, 262 U. S. 42, 69 L. Ed. 162;

Hill v. *United States*, 300 U. S. 105, 81 L. Ed. 537.

Under the Fifth Amendent to the Constitution, and Sections 541-555 and 582, 18 USCA the only legal way, in our judgment, by which the petitioner could be charged is by presentment or indictment by a Grand Jury.

—*Ex Parte Wilson*, 114 U. S. 417, 29 L. Ed. 89;

Mackin v. *United States*, 117 U. S. 348, 29 L. Ed. 909;

Parkinson v. *United States*, 121 U. S. 281, 30 L. Ed. 959;

Falconi v. *United States* (6th Cir.), 280 Fed. 766;

Gompers v. *Buck's Stove & R. Co.*, 221 U. S. 418, 55 L. Ed. 797;

Ex Parte McClusky, 40 Fed. 71;

United States v. *Gill*, 55 Fed. (2d) 399.

Since the Trial Court had the right to fine or imprison the petitioner, the amount of each being within its sound discretion limited only by the Eighth Amendment, the Fifth Amendment protected him, made it obligatory upon the prosecution to proceed by presentment or indictment of a Grand Jury, he, by pleading not guilty to the application to show cause, did not waive his rights thereunder.

In *United States* v. *Sloan*, 31 Fed. Supp. 327, this rule is announced:

> "When an accused is in danger of imprisonment in a penitentiary or confinement at hard labor if convicted, he has a right to insist that he be not put upon trial except on the accusation of a grand jury."

In *Ex parte McClusky, supra,* this rule is announced:

> "The right to be charged by indictment or presentment is a fundamental right of a party, which cannot be waived by him so as to deprive such party of afterwards setting up the want of jurisdiction in the court to try him."

In *United States* v. *Gill, supra,* it was held that the provision of the Fifth Amendment requiring an indictment is a personal privilege which may be waived, but also holds:

> "Sentence on plea of guilty to information charging violation of National Motor Vehicle Theft Act *held* void for want of lawful accusation."

The situation is such, as reflected by the record, that this Court, in our judgment, should grant certiorari.

—*House, Petitioner* v. *Mayo,* — U. S. —, 88 L. Ed. Advance Sheet No. 8, Page 528.

Point II

The Circuit Court of Appeals erred in holding that the sentence imposed was not unreasonable and excessive under the Eighth Amendment to the Constitution of the United States.

The petitioner, after he has served thirty days under said sentence, may be relieved and discharged from such service under Section 641, 18 USCA (1944 Cumulative Annual Pocket Part) as provided for therein. Such discharge, however, does not relieve him from payment of the fine, and the United States may levy upon any non-exempt property of his or sue him upon said fine and there is no limitation

as to the time within which an action might be brought thereon. *Smith* v. *United States* (9th Cir.), 143 Fed. (2d) 228.

The Emergency Price Control Act, as amended, is a war measure, and under it said preliminary injunction was entered enjoining the petitioner from a violation of certain provisions of said Act and regulations promulgated thereunder. He was charged with the violation of said injunction and not of said Act or any regulation promulgated thereunder. The amount of the fine should be determined upon the facts and circumstances surrounding the violation of said injunction. Said Emergency Price Control Act contains both civil and criminal provisions and the petitioner may be prosecuted criminally thereunder for a violation thereof, and this fact should, in our judgment, have some bearing upon the amount of the fine for the violation of said injunction.

As we understand the general prevailing rule the object of proceedings for criminal contempt is punitive, and the purpose of the punishment imposed is to vindicate and preserve the power, integrity, and dignity of the Courts and to compel obedience to their orders.

—17 C. J. S., Section 91;

Huffman v. *United States* (10th Cir.), 148 Fed. (2d) 943.

There is no rule by which a court exercising its sound discretion may definitely fix the amount of a fine, and by reason of this fact, the facts and circumstances of each par-

ticular case must be viewed liberally in favor of the accused. The petitioner is a used automobile dealer in Oklahoma City, Oklahoma. He is a man of family, having a wife and married daughter. He has never been charged or convicted of any offense, State or Federal, and has lived in Oklahoma City for about eighteen years. The record does not show his actual or probable financial situation, except in a general way, but it is fair to assume from the record that payment of the fine imposed will cripple him financially. He made a mistake, but under the record as a whole we respectfully submit that the fine imposed is excessive and unreasonable and violates his rights under the Eighth Amendment to the Constitution of the United States.

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July, 1945.